

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LYNN P. BAKER

Plaintiff,

vs.

MICHAEL J. ASTRUE,

Defendant.

3:07-cv-00527-BES (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

August 11, 2008

This Report and Recommendation is made to the Honorable Brian E. Sandoval, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for reversal of the Commissioner's decision (#10). Defendant filed a cross-motion for summary judgment and in opposition to plaintiff's motion for reversal (#11) and plaintiff did not reply. The court has thoroughly reviewed the parties' pleadings and the administrative record ("AR") and finds that the administrative law judge's ("ALJ") findings are supported by substantial evidence in the record. The ALJ gave clear and convincing reasons for finding plaintiff's statements concerning the intensity, persistence and limiting effects of her symptoms not credible and concluding plaintiff was not under a disability from the onset date to the date last insured (AR 17 - 25). For the reasons set forth below, the court recommends that the plaintiff's motion for reversal of the Commissioner's decision (#10) be denied and defendant's cross-motion for summary judgment and in opposition to plaintiff's motion for reversal (#11) be granted.

I. ADMINISTRATIVE PROCEEDINGS

Plaintiff Lynn Baker ("plaintiff") filed an application for Social Security disability insurance benefits on June 10, 2004 claiming disability beginning October 30, 2003 ("the onset date"). The Social Security Administration ("SSA") denied plaintiff's initial claim on August 11, 2004, and also denied her claim upon reconsideration on June 21, 2005. The claimant then filed a timely written request for a hearing on August 16, 2005 (AR 94 - 98). The ALJ held the hearing

1 on October 2, 2006 in Reno, NV. On March 12, 2007, the ALJ denied disability (AR 17 - 25),
2 and on September 18, 2007, the SSA Appeals Council denied review of this case (AR 5-7).
3 Having exhausted all administrative remedies, plaintiff filed a complaint for judicial review on
4 November 6, 2007 (#1).

5 II. BACKGROUND

6 Plaintiff was born on August 18, 1953, and was fifty-three years old at the time of her
7 hearing (AR 38). Plaintiff has completed high school and some college, and served in the United
8 States Army for roughly one year (AR 39 - 40). Plaintiff's last employment was as a shop clerk
9 at a dry cleaners (AR 40). Her past work experience includes employment as a cashier, dry
10 cleaner clerk, check cashier, mortgage clerk, and mortgage underwriter (AR 74-79). Plaintiff
11 alleges that she became disabled on October 30, 2003 due to pancreatitis, gastrointestinal
12 disorders, and nausea from medication (AR 83 - 84).

13 Pursuant to this court's order, plaintiff stipulates that the ALJ fairly and accurately
14 summarized the material medical evidence and all other evidence supporting this matter (#10, p.
15 2). The ALJ in the present case found the plaintiff not disabled at step four of the five step
16 analysis because he found the plaintiff capable of performing sedentary, light and medium
17 occupations at the unskilled level (AR 25). Specifically, the ALJ made the following findings:

- 18 1. The claimant last met the insured status requirements of the Social
19 Security Act on December 31, 2006.
- 20 2. The claimant did not engage in substantial gainful activity during the
21 period from her alleged onset date of October 30, 2003 through her date
22 last insured of December 31, 2006 (20 CFR 404.1520(b) and 404.1571 *et*
23 *seq.*).
- 24 3. Through the date last insured, the claimant had the following severe
25 impairments: pancreatitis and nausea from medications (20 CFR
26 404.1520(c)).
- 27 4. Through the date last insured, the claimant did not have an impairment or
28 combination of impairments that met or medically equaled one of the
listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR
404.1520(d), 404.1525 and 404.1526).
5. The claimant had the residual functional capacity to stand/walk eight
hours in an eight hour workday with normal breaks, sit eight hours in an
eight hour workday with normal breaks. She can occasionally lift/carry

1 and push/pull 50 pounds and she can frequently lift/carry and push/pull 25
2 pounds.

3 6. Through the date last insured, the claimant's past relevant work as cashier,
4 dry cleaner clerk, check cashier, mortgage clerk, and mortgage
5 underwriter, did not require the performance of work-related activities
6 precluded by the claimant's residual functional capacity (20 CFR
7 404.1565).

8 7. The claimant was not under a disability as defined in the Social Security
9 Act, at any time from October 30, 2003, the alleged onset date, through
10 December 31, 2006, the date last insured (20 CFR 404.1520(f)).

11 (AR 19-25).

12 III. STANDARD OF REVIEW

13 The court must uphold the decision of an ALJ if the ALJ properly applied the correct legal
14 standards and the findings of fact are supported by substantial evidence in the record. *See Smolen*
15 *v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); 42 U.S.C. § 405(g). "Substantial evidence" has
16 been defined as "relevant evidence which a reasonable person might accept as adequate to support
17 a conclusion." *Matthews v. Shalala*, 10 F.3d 678, 679 (9th Cir. 1993); *see also Richardson v.*
18 *Perales*, 402 U.S. 389, 401 (1971). Substantial evidence is more than a mere scintilla but less
19 than a preponderance. *See Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997), *citing*
20 *Smolen*, 80 F.3d at 1279. "To determine whether substantial evidence exists [the court must] look
21 at the record as a whole, considering both evidence that supports and undermines the ALJ's
22 findings. However, if the evidence is susceptible of more than one rational interpretation, the
23 decision of the ALJ must be upheld." *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995)
24 (citations omitted). The ALJ alone is responsible for determining credibility and for resolving
25 ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

26 The Social Security Act ("the Act") defines disability as "the inability to engage in any
27 substantial gainful activity by reason of any medically determinable physical or mental
28 impairment which . . . has lasted or can be expected to last for a continuous period of not less than
12 months." 42 U.S.C. § 423(d)(1)(A) (2004). A claimant is considered disabled "only if his
physical or mental impairment or impairments are of such severity that he is not only unable to
do his previous work but cannot . . . engage in any other kind of substantial gainful work which

1 exists in the national economy” 42 U.S.C. § 423(d)(2)(A).

2 Pursuant to the Act, the Secretary has adopted regulations which establish a formalized,
3 five-step sequential evaluation process to determine whether a claimant is disabled. *See* 20
4 C.F.R. § 404.1520. The ALJ considers: (1) whether the person is engaging in substantial gainful
5 activity; (2) the severity of the alleged impairment; (3) whether the impairment meets or equals
6 a listed impairment and meets the duration requirement; (4) whether the individual is capable of
7 doing work he or she has done in the past; and (5) whether the impairment prevents the person
8 from doing any other work. *Id.* If at any point in the five-step inquiry it is determined that a
9 claimant is or is not disabled, further review is unnecessary.

10 IV. ANALYSIS

11 Plaintiff challenges the ALJ’s findings on the grounds that the ALJ incorrectly rejected
12 plaintiff’s credibility in finding plaintiff not disabled and capable of performing her past relevant
13 work at step four of the five step disability evaluation process (#10, p. 4). Plaintiff argues that
14 she is fully disabled at step five of the sequential analysis and unable to work. *Id.*

15 Defendant contends the ALJ properly found that plaintiff’s allegations about her
16 limitations and subjective symptoms lacked credibility (#11, p. 3).

17 A. Medical Evidence

18 The record reflects that plaintiff began experiencing abdominal pain in December 2003
19 and sought the care of Dr. Spogan (AR 210). After multiple visits with Dr. Spogan and continued
20 complaints of abdominal pain, Dr. Spogan diagnosed plaintiff with chronic pancreatitis and
21 recommended a cholecystectomy. *Id.* Dr. Mark Kozar performed a cholecystectomy on plaintiff
22 on March 11, 2004 (AR 165). Dr. Kozar found dense adhesions, or “gallstones,” during the
23 cholecystectomy (AR 166). The record shows that directly following the surgery, plaintiff’s
24 doctors found the surgery to be successful (AR166, 231).

25 In March 2004, Dr. Spogan reported that plaintiff was “feeling much better” following the
26 cholecystectomy (AR 203). The plaintiff however, reported experiencing post-surgical diarrhea,
27 which Dr. Fricke, a gastroenterologist, treated with Welchol in August 2004 (AR 184 - 185). In
28 July 2006, plaintiff reported complications to Dr. Lieberstein, a digestive health specialist, that

1 the Welchol caused plaintiff nausea and constipation (AR 275). Plaintiff stopped taking Welchol
 2 because of these side effects and since then, the record reflects, that plaintiff complains of
 3 intermittent diarrhea and constipation which she treats with laxatives, pain medication, and rest
 4 as needed (AR 275, 61, 46, 47, 52, 63, 66).

5 **B. Plaintiff's Credibility**

6 The ALJ found plaintiff "not entirely credible" (AR 23), which plaintiff challenges in her
 7 motion for reversal (#10, p. 6). The ALJ is responsible for determining credibility, resolving
 8 conflicts in medical testimony and resolving ambiguities. *Reddick v. Chater*, 157 F.3d 715, 722
 9 (9th Cir. 1998). In order to determine credibility and resolve ambiguities between plaintiff's
 10 subjective symptom testimony and the objective medical evidence, an ALJ must perform the two
 11 stages of the *Cotton* analysis. *Bunnell v. Sullivan*, 947 F.2d 341, 342 (9th Cir. 1991). At the first
 12 step of the *Cotton* analysis, the plaintiff "must produce objective medical evidence of an
 13 underlying impairment 'which could reasonably be expected to produce the pain or other
 14 symptoms alleged . . .'" *Cotton v. Bowen*, 799 F.2d 1403, 1407 - 8 (9th Cir. 1986) (citation
 15 omitted). If a claimant produces medical evidence of an impairment, the ALJ proceeds to the
 16 second step of the *Cotton* analysis. Under the second step of the *Cotton* analysis, the ALJ may
 17 not discredit the claimant's testimony as to the severity of the symptoms merely because they are
 18 unsupported by objective medical evidence. *Reddick*, 157 F.3d at 722, citing *Bunnell v. Sullivan*,
 19 947 F.2d 341, 343 (9th Cir. 1991) (*en banc*). If the ALJ rejects the claimant's subjective
 20 complaints, the ALJ must provide "specific, cogent reasons for the disbelief." *Lester v. Chater*,
 21 81 F.3d 821, 834 (9th Cir. 1995). If medical evidence of an impairment exists, "unless there is
 22 affirmative evidence showing that the claimant is malingering, the Commissioner's reasons for
 23 rejecting the claimant's testimony must be 'clear and convincing.'" *Lester*, 81 F.3d at 834. The
 24 ALJ must identify what specific evidence undermines the plaintiff's complaints. *Id.*

25 Plaintiff satisfies the first step of the *Cotton* analysis because the ALJ concluded that the
 26 objective medical evidence for the plaintiff's impairments could have been reasonably expected
 27 to produce the alleged symptoms (AR 23 - 25). Additionally, the ALJ properly gave specific
 28 reasons substantiated by evidence when he concluded that, at the second step of the *Cotton*

1 analysis, plaintiff's testimony regarding intensity, persistence and limiting effects of the alleged
2 symptoms was not credible. *Id.* The ALJ gave three main reasons for finding that the plaintiff's
3 testimony not credible. *Id.* First, the ALJ noted that Dr. Kozar reported that plaintiff had
4 recovered "quite well" from her gallbladder surgery in March 2004 (AR 231). He further noted
5 that according to Dr. Spogan, the plaintiff was "feeling better" following her surgery in March
6 2004, and that her pancreatitis was "OK" in April 2005 (AR 194, 203).

7 Second, in addition to finding that plaintiff's medical impairments appear to have been
8 resolved, the ALJ notes that plaintiff's subjective complaints are much worse than objective
9 findings (AR 23). Plaintiff testified at the hearing that she suffers from "constant diarrhea" (AR
10 46). Plaintiff also claimed to feel worse since her gallbladder was removed through the
11 cholecystectomy (AR 47). She also testified that she has pancreas attacks "all the time" and that
12 they last for two or three days at a time (AR 52). According to plaintiff's testimony, she cannot
13 sit during these attacks, but must recline or lay down (AR 60, 70 - 71). Plaintiff also claimed to
14 use the bathroom approximately every ten minutes to every half an hour in the morning (AR 62).
15 Plaintiff testified that she had to use the bathroom at this same rate when she worked both as a
16 dry cleaner clerk and at her positions at the mortgage company which caused her to leave both
17 of those jobs (AR 68). Finally plaintiff indicated that in any job she undertook, she would have
18 to take these frequent breaks, that this would prevent her from working, and that there is no
19 medical remedy available to alleviate her condition (AR 71 - 73).

20 The ALJ found the disparity between plaintiff's subjective complaints and the objective
21 medical evidence particularly relevant concerning whether plaintiff is able to work; that while her
22 medical impairments may limit her physical activity somewhat, the limitations are not severe
23 enough to meet the requirements for total disability (AR 24, 91). The ALJ noted that although
24 plaintiff subjectively claims that she cannot work, the Disability Determination Service found in
25 June 2005 that plaintiff could perform medium work (AR 213 - 220). The ALJ further found that
26 Dr. Kozar reported in the March 17, 2004, follow-up visit after the cholecystectomy that plaintiff
27 was doing well and was able to return to work (AR 22, 231). In July 2006, Dr. Lieberstein noted
28 that "diarrhea has not even been a major problem" for the plaintiff (AR 23, 278). Lastly, the ALJ

1 noted that in July 2006, Dr. Spogan indicated that plaintiff's history of abdominal pain was
2 "resolved," that plaintiff's constipation was "completely resolved," and that she was having daily
3 bowel movements (AR 23, 273).

4 Lastly, the ALJ highlights that plaintiff testified to not performing chores around the
5 house, despite the fact that no physician has identified any exertional limitations (AR 23). The
6 ALJ found that this testimony regarding housework was inconsistent with plaintiff's other
7 testimony. *Id.* Plaintiff claims that frequent need to use the bathroom prevents her from
8 successfully maintaining employment. While it may be true that frequent interruptions would
9 obstruct a desk worker's ability to interact effectively with clients, frequent bathroom use should
10 not hinder one's ability to complete household tasks that can be interrupted to accommodate the
11 performer's schedule, such as dusting, light cooking or vacuuming (AR 54 - 60). Nonetheless,
12 plaintiff claims that frequent bathroom use prevents her from performing most activities of daily
13 living (AR 62). Further, driving to the grocery store, a household task that would seem to be
14 problematic given the frequent need to use the restroom and the claimed inability to sit, is one of
15 the only productive activities in which plaintiff engages (AR 58).

16 When he found the plaintiff's testimony not credible, the ALJ relied on these
17 inconsistencies together with the objective evidence demonstrating the plaintiff's medical
18 improvement as specific evidence undermining plaintiff's complaints. The court finds the ALJ
19 gave clear and convincing reasons in support of this conclusion and that this conclusion is
20 supported by substantial evidence in the record.

21 V. CONCLUSION

22 Based on the foregoing, the court concludes that the ALJ gave clear and convincing
23 reasons to discredit the plaintiff's testimony that she is not able to work. The court finds that the
24 ALJ properly determined that the objective medical evidence for the plaintiff's impairments could
25 have been reasonably expected to produce the alleged symptoms, satisfying the first step of the
26 *Cotton* analysis. The court further finds that the ALJ properly supported its decision that plaintiff
27 lacked credibility at the second step of the *Cotton* analysis when he made the following findings:
28 first, that the doctors who treated plaintiff reported that plaintiff successfully recovered from

1 gallbladder surgery; second, that plaintiff's subjective complaints were consistently
2 disproportionate to the objective medical evidence; and finally, that plaintiff provided inconsistent
3 testimony regarding the activities of daily living she is capable of performing, given her
4 condition. The court additionally finds that the ALJ properly applied the correct legal standards
5 and his findings of fact are supported by substantial evidence in the record. Thus, the court
6 recommends that the plaintiff's motion for reversal of the Commissioner's decision (#10) be
7 denied and defendant's cross-motion for summary judgment and in opposition to plaintiff's
8 motion for reversal (#11) be granted..

9 The parties are advised:

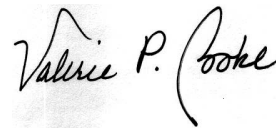
10 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
11 the parties may file specific written objections to this report and recommendation within ten days
12 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
13 Recommendation" and should be accompanied by points and authorities for consideration by the
14 District Court.

15 2. This report and recommendation is not an appealable order and any notice of appeal
16 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
17 judgment.

18 IV. RECOMMENDATION

19 **IT IS THEREFORE RECOMMENDED** that the plaintiff's motion for reversal of the
20 Commissioner's decision (#10) be **DENIED** and defendant's cross-motion for summary
21 judgment and in opposition to plaintiff's motion for reversal (#11) be **GRANTED**.

22 **DATED:** August 11, 2008.

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24 UNITED STATES MAGISTRATE JUDGE
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